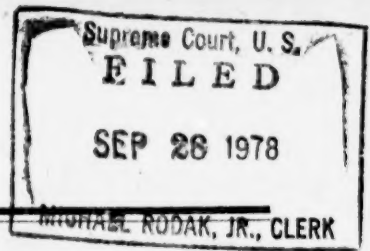


No. 78-187



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

---

ENCARNATION T. DAVID and CLEMENTE D. DAVID,  
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

---

WADE H. MCCREE, JR.  
*Solicitor General*

PHILIP B. HEYMANN  
*Assistant Attorney General*

SIDNEY M. GLAZER  
DAVID B. SMITH  
*Attorneys*  
*Department of Justice*  
*Washington, D.C. 20530*

---

---

## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statutes involved .....	2
Statement .....	4
Argument .....	7
Conclusion .....	11

## CITATIONS

### Cases:

<i>Cacho v. INS</i> , 547 F.2d 1057 .....	9
<i>Castro-Guerrero v. INS</i> , 515 F.2d 615 .....	9
<i>Escobar Ordonez v. INS</i> , 526 F.2d 969 .....	9
<i>Gonzalez de Moreno v. INS</i> , 492 F.2d 532 .....	8
<i>Guel-Perales v. INS</i> , 519 F.2d 1372 .....	9
<i>INS v. Errico</i> , 385 U.S. 214 .....	8
<i>Persaud v. INS</i> , 537 F.2d 776 .....	10
<i>Reid v. INS</i> , 420 U.S. 619 .....	8, 9

### Statutes and regulation:

Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*:

Section 212, 8 U.S.C. 1182 .....	8
Section 212(a), 8 U.S.C. 1182(a) .....	2
Section 212(a)(14), 8 U.S.C. 1182 (a)(14) .....	2, 4, 6, 7, 9, 10
Section 212(a)(19), 8 U.S.C. 1182 (a)(19) .....	3, 8, 10
Section 212(a)(20), 8 U.S.C. 1182 (a)(20) .....	4, 10

II

Statutes and regulation—Continued	Page
Section 241, 8 U.S.C. 1251 .....	3
Section 241(a)(1), 8 U.S.C. 1251(a)	
(1) .....	4
Section 241(f), 8 U.S.C. 1251(f) .....	2, 6, 7, 10
Section 243(h), 8 U.S.C. 1253(h) .....	5
8 C.F.R. 108.2 .....	5

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

---

No. 78-187

ENCARNATION T. DAVID and CLEMENTE D. DAVID,  
PETITIONERS

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

---

**OPINIONS BELOW**

The judgment order of the court of appeals (Pet. App. 1a) and the decision of the Board of Immigration Appeals (Pet. App. 2a-5a) are not reported.

**JURISDICTION**

The order of the court of appeals was entered on June 6, 1978. The petition for a writ of certiorari

(1)

was filed on August 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether petitioner Encarnation David is an alien who was "otherwise admissible" at the time of her entry into the United States by means of fraud and is therefore eligible for relief from deportation under Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f).

#### STATUTES INVOLVED

Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(a), provides in pertinent part:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

\* \* \* \*

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled

labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

\* \* \* \*

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact \* \* \*.

Section 241 of the Act, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

\* \* \* \*

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

## STATEMENT

Petitioners, husband and wife, are natives and citizens of the Philippines. On February 6, 1971, Mr. David entered the United States as a nonimmigrant visitor authorized to remain for 30 days (A.R. 38).<sup>1</sup> He failed to leave within the time prescribed and fraudulently altered his Form I-94 (Arrival-Departure Record) to show extensions of his authorized stay until March 1, 1975 (A.R. 23, 38).

Although petitioners have been married to each other since November 8, 1959, Mrs. David obtained false documents purporting to show that she was married to Alfred Donnelly, an American citizen. Donnelly was a fictitious person. By means of this fraud, Mrs. David entered the United States on August 23, 1973, as the spouse of an American citizen, leaving her and Mr. David's five minor children in the Philippines (A.R. 2, 23, 38).

At their joint deportation hearing in December 1974, both petitioners conceded that they were deportable (A.R. 31-32).<sup>2</sup> Petitioners' counsel also con-

<sup>1</sup> "A.R." refers to the administrative record filed in the court of appeals.

<sup>2</sup> Mrs. David was charged with deportability under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1), in that, at the time of entry, she was within one or more classes of aliens excludable by the law, *i.e.*, aliens who are immigrants not in possession of a valid immigrant visa (Section 212(a)(20), 8 U.S.C. 1182(a)(20)) (A.R. 2). Deportability under Section 241(a)(1) could also have been predicated on the fact that she was excludable under Section 212(a)(14), 8 U.S.C. 1182(a)(14). See page 7 and n. 4, *infra*.

ceded that they were making no request for withholding of deportation on grounds of political asylum pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) (A.R. 33). Petitioners agreed not to raise a claim to political asylum if they were granted the privilege of voluntary departure in lieu of deportation (A.R. 23-24, 28). The Immigration and Naturalization Service (INS) agreed, and petitioners were granted four months' voluntary departure time (*ibid.*).

On April 15, 1975—four days before their voluntary departure period expired—petitioners, through different counsel, asked the District Director of INS for political asylum on the ground that they might be persecuted for their political and religious beliefs if they returned to the Philippines (A.R. 27). The District Director asked the Department of State for its opinion on the requests, as required by 8 C.F.R. 108.2; and on November 11, 1975, the Department of State informed the District Director that it did not believe petitioners would be subject to persecution in the Philippines (A.R. 21-24). On April 14, 1976, petitioners were informed that their request for political asylum was denied (A.R. 17-20). On April 21, 1976, petitioners moved to have their deportation proceedings reopened so that they could apply for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), on the ground that they would be subject to persecution in the Philippines because of their religion (A.R. 15-16). On June 22, 1976, the immigration judge denied the



motion to reopen, finding the claim of potential persecution to be without merit (A.R. 10). On August 31, 1976, the Board of Immigration Appeals dismissed petitioners' appeal (A.R. 8).

On September 21, 1976, Mrs. David made a new motion to reopen her deportation proceeding. This motion, which is the subject of the present litigation, sought relief from deportation under Section 241(f) of the Act, 8 U.S.C. 1251(f) (A.R. 6-7). In support of this motion, Mrs. David alleged that on January 26, 1976, she had given birth to a child who was a United States citizen by virtue of being born in this country. On September 29, 1977, the Board denied the new motion to reopen (Pet. App. 2a-5a). The Board held that Mrs. David was not entitled to relief under Section 241(f) because she was not "otherwise admissible" at the time of her fraudulent entry since she did not meet the labor certification requirement of Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14). On June 6, 1978, the court of appeals by judgment order affirmed the Board's decision "for the reasons set forth in the opinion of the Board of Immigration Appeals" (Pet. App. 1a).<sup>3</sup>

<sup>3</sup> The mandate of the court of appeals issued June 28, 1978. On July 26, 1978, petitioners' counsel was informed by the clerk of the court of appeals that their motion to recall the mandate of that court pending decision by this Court on their petition for a writ of certiorari was denied. Petitioners were scheduled for deportation from Newark, New Jersey, on July 31, 1978. Petitioners then sought a stay of their deportation in this Court. On August 7, 1978, Mr. Justice Brennan denied their stay application. Petitioners were again scheduled for deportation on August 16, but did not appear. On August 17,

## ARGUMENT

Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), excuses an alien's fraud at the time of entry into the United States if the alien was "otherwise admissible at the time of entry" and is the spouse, parent, or child of a United States citizen or permanent resident alien. Petitioners contend that the decision of the Board of Immigration Appeals denying Mrs. David relief under Section 241(f) because at the time of her entry she did not meet the labor certification requirement of Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14), erroneously interprets Section 241(f) and conflicts with this Court's decision in *INS v. Errico*, 385 U.S. 214 (1966). This claim is insubstantial and does not warrant review by this Court. (Mr. David does not contend that he is entitled to relief under Section 241(f); he urges only that if Mrs. David obtains permanent resident status, she could file a second preference visa petition in his behalf (see Pet. App. 3a).)

Despite Mrs. David's failure to satisfy the labor certification requirement of Section 212(a)(14),<sup>4</sup> peti-

the District Director of the INS also denied an application for a stay. Both petitioners have now been deported from the United States. The case is not moot, however, since we are informed by the INS that it would permit petitioners to return to the United States if this Court were to conclude that Mrs. David is entitled to relief under Section 241(f).

<sup>4</sup> Although petitioners emphasize (Pet. 5) that they have not been "permitted a full and formal hearing" on their request for relief under Section 241(f), they do not contend that Mrs. David was or is able to satisfy the labor certification requirements of Section 212(a)(14).

tioners contend (Pet. 6) that except for her fraud she was "otherwise admissible" at the time of her entry, within the meaning of Section 241(f), because that Section requires only that an alien meet "the physical, mental, and moral standards for admission to this country set out in 8 U.S.C. 1182," quoting *Gonzalez de Moreno v. INS*, 492 F.2d 532, 538 (5th Cir. 1974), and citing *INS v. Errico*, 385 U.S. 214 (1966).

This contention is without merit. In *Reid v. INS*, 420 U.S. 619, 630 (1975) (footnote omitted), this Court held that

Congress, in enacting Section 241(f), \* \* \* did not intend to arm the dishonest alien seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion unrelated to fraud, which are set forth in Section 212(a) of the Immigration and Nationality Act.

Noting the confusion engendered by the "broad language in some portions of the Court's opinion in *Errico*" (420 U.S. at 628), the Court in *Reid* explained the limited nature of its holding in *Errico*. The Court concluded in *Errico* that Section 241(f) relief was available to an alien who was subject to deportation for fraudulent entry under Section 212(a) (19), even though the INS had formally charged him, not with fraud, but with failure to meet quota requirements under another section of the Act. The Court in *Reid* expressly concluded that *Errico* is inapposite when the INS has specified any ground of de-

portability under Section 212 that is unrelated to the alien's fraud under Section 212(a) (19):

In view of the language of § 241(f) and the cognate provisions of § 212(a) (19), we do not believe *Errico's* holding may properly be read to extend the waiver provisions of § 241(f) to any of the grounds of excludability specified in § 212 (a) other than subsection (19). This conclusion, by extending the waiver provision of § 241(f) not only to deportation based on excludability under § 212(a) (19), but to a claim of deportability based on fraudulent misrepresentation in order to satisfy the [documentary] requirements of § 211(a), gives due weight to the concern expressed in *Errico* that the provisions of § 241(f) were intended to apply to some misrepresentations that were material to the admissions procedure.

420 U.S. at 630.

Following the decision in *Reid*, every court that has considered the question has recognized that Section 241(f) relief is not available to an alien who was excludable at the time of entry for reasons unrelated to his fraud or misrepresentation. *Cacho v. INS*, 547 F.2d 1057, 1062 (9th Cir. 1976) (failure to comply with labor certification requirements under Section 212(a) (14)); *Escobar Ordóñez v. INS*, 526 F.2d 969 (5th Cir. 1976); *Guel-Perales v. INS*, 519 F.2d 1372 (9th Cir. 1975). See also *Castro-Guerrero v. INS*, 515 F.2d 615 (5th Cir. 1975).

Petitioners rely on *Gonzalez de Moreno v. INS*, *supra*. But that case was decided prior to *Reid*, and it has not been followed in subsequent Fifth Circuit

cases. See *Escobar Ordonez v. INS*, *supra*, 526 F.2d at 970-971, and *Castro-Guerrero v. INS*, *supra*, 515 F.2d at 616-618.

Petitioners also urge (Pet. 7) that the Third Circuit's decision in this case conflicts with the same circuit's earlier decision in *Persaud v. INS*, 537 F.2d 776 (1976). *Persaud*, however, addressed only the question whether Section 241(f) relief was available to an alien in possession of a fraudulent visa at the time of his admission if the INS charged deportability under Section 212(a)(20) of the Act (lack of a valid visa or other entry document) rather than under Section 212(a)(19) (procurement of a visa by fraud or misrepresentation). The court of appeals concluded (537 F.2d at 779):

[W]e believe that the essence of *Reid* and *Errico* is that § 241(f) will not be available when its application would permit an alien to avoid a basis for deportation which is separate, independent, and unrelated to the fraud. However, *Reid* does not hold that § 241(f) may be circumvented by the Service when the fraudulent acts alone form the basis for deportation.

As the Board of Immigration Appeals correctly concluded, by virtue of this Court's decision in *Reid*, Mrs. David is not entitled to relief under Section 241 (f) because she was ineligible for admission at the time of her entry for a reason unrelated to her fraud—namely, her failure to meet the labor certification requirement of Section 212(a)(14).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

PHILIP B. HEYMANN  
*Assistant Attorney General*

SIDNEY M. GLAZER  
DAVID B. SMITH  
*Attorneys*

SEPTEMBER 1978